

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANGELA L. COOK)	
Claimant)	
VS.)	
)	Docket No. 1,052,116
STATE OF KANSAS)	
Respondent)	
AND)	
)	
STATE SELF INSURANCE FUND)	
Insurance Carrier)	

ORDER

Claimant and Respondent requested review of the May 1, 2012 Order by Special Administrative Law Judge (SALJ) Jerry Shelor. A telephone hearing was held by the SALJ on April 26, 2012. No record of that hearing is contained in this record. Claimant is represented in this matter by Dennis L. Horner of Kansas City, Kansas. Respondent is represented by Nathan D. Burghart of Lawrence, Kansas.

ISSUES

In the May 1, 2012 Order, the SALJ decided "after hearing arguments of counsel and review of the file by the Court" to impose new terminal dates for claimant and respondent. The SALJ, in the May 1, 2012 Order, also ordered respondent to pay, "Due to respondent's delay in providing evidence to claimant in a timely fashion, any costs associated with taking additional evidence from Mr. Dreiling or the retaking of depositions for rebuttal purposes of any witnesses for claimant's counsel, including witness fees, attorney's fees and court reporters fees shall be assessed against the respondent".

The claimant requests review of whether the SALJ erred in his determination that respondent was entitled to a vocational evaluation after the regular hearing and evidentiary deposition of claimant's evaluating physician. Claimant, in her brief to the Board, argues that the Kansas Workers Compensation Act (Act) provides no authority for a respondent to request a vocational evaluation under any circumstance.

Respondent requests review of whether the SALJ exceeded his jurisdiction by ordering respondent to pay costs, witness fees and attorney's fees related to any rebuttal evidence that claimant decides to take. Respondent also contends the SALJ exceeded his jurisdiction by extending claimant's terminal dates and allowing rebuttal evidence. Respondent argues that the Board should reverse the Order.

FINDINGS OF FACT

Claimant suffered personal injury which arose out of and in the course of her employment with respondent on February 17, 2010. The matter went to regular hearing on April 10, 2012, with the SALJ establishing terminal dates of May 10, 2012 for claimant and June 10, 2012 for respondent.¹ Claimant attempted to schedule the deposition of Mike Dreiling, her vocational expert, on May 21, 2012, 11 days beyond her terminal date. Respondent objected.

Also, at about the time of the regular hearing, respondent attempted to schedule an evaluation of claimant with vocational expert Karen Crist Terrill. Claimant's attorney advised, by letter dated April 16, 2012, addressed Ms. Terrill, and copied to respondent's attorney, that claimant would not be available for the evaluation as "It is too late for this evaluation". No additional explanation was provided in the letter. Apparently, at some point, claimant also requested an extension of her terminal date in order to take the deposition of vocational expert Michael Dreiling. The exact date of that request is not clear as there is no request for an extension of her terminal date by claimant on file with the Director. The disputes involving both claimant's and respondent's requests and objections went before the SALJ by telephone conference on April 26, 2012. There is no transcript of that telephone conference. After the conference, the May 1, 2012 Order was issued. The Order extends both claimant and respondent's terminal dates, but makes no mention of respondent's vocational evaluation request. The SALJ, in issuing his Order, cites no authority in support of his decision to award attorney fees, witness fees and court reporter fees.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2000 Furse 44-510g(a) states in part:

No vocational assessment, evaluation, services or training shall be provided or made available under the workers compensation act unless specifically agreed to by the employer or insurance carrier providing or making available such assessment, evaluation services or training.

¹ R.H. Trans. at 60.

K.A.R. 51-24-4 states in part:

For vocational rehabilitation case under the Kansas workers compensation act, each person, firm, or corporation proposing to qualify as a vendor shall file an application with the director. . . . Each application shall include the following:

- (f) a statement indicating whether the person, firm, or corporation wants to be included in the list of vendors qualified and requesting to receive referrals from employers or the director;
- (g) a statement that the person, firm, or corporation will report, in a form prescribed by the director, to the vocational rehabilitation administrator each referral received from an employer or insurance carrier and the date of the referral;

Claimant argues that the Act provides no authority for a respondent to request a vocational evaluation under any circumstance. The above statute and the administrative regulations propounded by the Director provide for vocational assessments. Claimant's argument, therefore, is without merit.

K.S.A. 2009 Supp. 44-555c(a) states:

- (a) There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

An Order extending terminal dates is not a finding of compensability, nor is it a determination of any of the issues presented to the SALJ at the regular hearing. It is neither a preliminary award of benefits under K.S.A. 44-534a, nor a final award under K.S.A. 44-523. The exact nature of this order is impossible to determine, as no notice of the hearing was issued, and no transcript of the actions or record of the evidence considered by the SALJ at the April 26, 2012 hearing was created. The only indication as to the nature of the hearing came in the form of letters written to the SALJ by both claimant's and respondent's attorneys, both of which describe the hearing simply as a telephone conference. The SALJ's order was not a preliminary hearing order.

The Board may review those preliminary hearing orders where it is alleged that an administrative law judge has exceeded his or her jurisdiction or authority in providing or denying the benefits requested.²

² K.S.A. 2009 Supp. 44-551(i)(2)(A).

K.S.A. 2000 Furse 44-536(g) and (h) state:

(g) In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of disability compensation, the attorney fees shall be paid from such amounts of disability compensation. If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund. If the services rendered herein result in a denial of additional compensation, the director may otherwise authorize a fee to be paid by respondent.

(h) Any and all disputes regarding attorney fees, whether such disputes relate to which of one or more attorneys represents the claimant or claimants or is entitled to the attorney fees, or a division of attorney fees where the claimant or claimants are or have been represented by more than one attorney, or any other disputes concerning attorney fees or contracts for attorney fees, shall be heard and determined by the administrative law judge, after reasonable notice to all interested parties and attorneys.

K.S.A. 2000 Furse 44-512a(b) states:

(b) After the service of such written demand, if the payment of disability compensation or medical compensation set forth in the written demand is not made within 20 days from the date of service of such written demand, plus any civil penalty, as provided in subsection (a), if such compensation was in fact past due, then all past due compensation and any such penalties shall become immediately due and payable. Service of written demand shall be required only once after the final award. Subsequent failures to pay compensation, including medical compensation, shall entitle the employee to apply for the civil penalty without demand. The employee may maintain an action in the district court of the county where the cause of action arose for the collection of such past due disability compensation and medical compensation, any civil penalties due under this section and reasonable attorney fees incurred in connection with the action.

K.S.A. 2000 Furse 44-536a(d)

(d) If a pleading, motion or other paper provided for by the workers compensation act is signed in violation of this section, the administrative law judge, director or board, upon motion or upon its own initiative upon notice and after opportunity to be heard, shall impose upon the person who signed such pleading or a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including reasonable attorney fees.

The SALJ awarded attorney fees to claimant for the taking of the deposition of Mr. Dreiling and any witnesses necessary for claimant's counsel. No statutory justification for this order was provided. Neither K.S.A. 44-536, nor K.S.A. 44-512a allow for the award of attorney fees pre-award. K.S.A. 44-536a(d) allows the award of attorney fees before the final award if a pleading, motion or other paper is signed in violation of the statute. However, the Order issued by the SALJ fails to discuss any statutory violation found in any pleading, motion or other paper filed with the Division.

The SALJ appears to have granted claimant "pre-award" attorney fees in the Order. The Board cannot ascertain the basis for or the reasoning behind the SALJ's issuance of this order. Post-Award attorney fees and fees associated with the attempted collection of past due benefits are allowed under certain circumstances. K.S.A. 44-536(f) and K.S.A. 44-536(d) control the award of attorney fees, pre-award. Attorney fees in workers compensation cases are allowable only where expressly authorized by the Act.³ Due to an absence of a record of the proceedings leading to this Order, there is no way for the Board to determine whether those attorney fees are appropriate or not.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁴

While jurisdiction allows the court to decide matters wrongly, it does not allow the circumvention of a statute or administrative regulation. Here, the reasons behind the Order are not explained and no transcript or evidence exists upon which such a determination may be made. Before a determination regarding the order for attorney fees can be made, this matter must be remanded to the SALJ with instructions to create a transcript and to provide evidence of the reasoning behind the order.

³ *Lackey v. D & M Trucking*, 9 Kan. App. 2d 679, 687 P.2d 23 (1984).

⁴ *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977); *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

K.A.R. 51-2-4(d) states:

(d) The fees of the reporter for hearings and depositions, including all copies furnished as provided above, shall be paid by the respondent upon completion of the transcript by the reporter. The fees shall be assessed by the administrative law judge in the final award. If the fees are assessed against a party other than the respondent and if the respondent has paid the fees, the party against whom they are assessed shall make the necessary reimbursement.

The Act requires that the fees of a reporter for hearings and depositions be paid for by the respondent. Any order to the contrary requires a special ruling by the ALJ. The portion of the Order requiring respondent to pay the cost of court reporter fees is within the authority of the SALJ, and the SALJ did not exceed his jurisdiction in ordering same. Therefore, this is not an issue over which the Board would take jurisdiction on an appeal from an interlocutory Order. That portion of the SALJ's Order remains in full force and effect.

K.S.A. 2000 Furse 44-553 states:

Each witness who appears before the director or administrative law judge in response to a subpoena shall receive the same fee and mileage as is provided for witnesses attending district courts in civil cases in this state. The director or the administrative law judge, whoever is conducting the hearing, shall tax and apportion the costs of such witness fees in the discretion of the director or the administrative law judge, as the case may be, and shall make such orders relative to the payment of such fees as the director or the administrative law judge deems expedient in order to secure and provide for the payment of the witness fees.

The Act allows the award of witness fees in certain circumstances. The Kansas Supreme Court has ruled that post award expert witness fees may not be awarded against a respondent.⁵ However, this situation is not yet post-award. Whether the award of witness fees violates either K.S.A. 44-553 or the Court's ruling in *Higgins* cannot be determined at this stage of the proceedings. The Board cannot find that the SALJ exceeded his jurisdiction in ordering same. Therefore, respondent's appeal on this issue is premature and the Board does not take jurisdiction over this issue at this time. That determination is better left for the final award. If an appeal is filed at that time, the Board will review the issue at that time.

CONCLUSIONS

Based upon this record, it cannot be determined whether the SALJ exceeded his jurisdiction in ordering attorney fees to be assessed against respondent in this situation.

⁵ *Higgins v. Abilene Machine, Inc.*, 288 Kan. 359, 204 P.3d 1156 (2009).

That portion of the Order is remanded to the SALJ with instructions to hold a hearing, with a record of same, pursuant to K.S.A. 44-536a(d). The Board finds that the Order is interlocutory and the Board is without jurisdiction to review the remainder of the May 1, 2012 Order. Therefore, that portion of the Order granting an extension of the parties terminal dates and addressing witness fees and court reporter fees remains in full force and effect.

ORDER

WHEREFORE, it is the finding, decision and order of the Board that the Order of Special Administrative Law Judge Jerry Shelor dated May 1, 2012, is remanded with regard to the award of attorney fees against respondent with instructions to the SALJ to hold a hearing as required by K.S.A. 44-555c(a), but the remainder of the Order remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of August, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Jerry Shelor, Special Administrative Law Judge
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